HOTEL MALAYA SDN. BHD. & ANOR.

v.

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS & ANOR.

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH CJ (MALAYA)
WAN SULEIMAN FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 63 OF 1982]
5 JULY 1982

CIVIL PROCEDURE: *Jurisdiction - Industrial Court - Award handed by Industrial Court presided by a Chairman and three members - Application to refer questions of law arising out of the award to High Court - Application heard by different panel headed by the President - Whether different panel has jurisdiction to hear and determine application.*

This is an appeal against the dismissal of the appellants' application by Hashim Yeop A. Sani J to quash the decision of the Industrial Court which held it had jurisdiction to hear and determine two applications under s. 33A of the Industrial Relations Act to refer to the High Court certain questions of law that had arisen out of two awards made by a different panel of the Industrial Court.

On 16 August 1979 the Minister of Labour and Manpower referred two trade disputes between the 1st respondent and the appellants to the Industrial Court. On 30 May 1981 the Court composed of a Chairman and three members handed down two awards. The Chairman had since retired. On 18 September 1981 the Court constituted of Harun Mahmud Hashim J, President of the Industrial Court and three different members heard the applications by the 1st respondent to refer certain questions of law arising out of both the awards to the High Court. Harun J after hearing arguments held on 31 October 1981 that it has jurisdiction to hear the applications.

Pursuant to the leave granted by Hashim Yeop A. Sani J to apply for an order of *certiorari* to quash the decision of the Industrial Court dated 31 October 1981, the learned judge after hearing arguments with regard to the lack of jurisdiction of the Industrial Court headed by the President and 3 members dismissed the application for *certiorari*.

The appellants' Counsel argued that differently constituted Court had no jurisdiction to hear the applications as it was not the same Court which handed down the awards on 30 May 1981. He contended that the same Court which handed down the awards should and indeed hear the applications as they were familiar with the proceedings heard by them and a differently constituted Court could not possess first hand knowledge of the substantial proceedings. Counsel also submitted that the proceedings which had begun before the Chairman of the Industrial Court who had since retired were not finally disposed of until the expiry of 30 days after the making of the award had expired [s. 33A(3)] or, if an application was made under s. 33A, until that application had been rejected or refused by the Industrial Court, or if granted, until the determination by the High Court of the questions referred to it [s. 33A(5)]. He relied on the provisions of sub-section (4) of s. 22 of the Act and two cases referred to in the Judgement. He further contended that it was a breach of natural justice for the freshly constituted panel of the Industrial Court headed by the President to participate in the decision of 31 October 1981, if it had not heard all the evidence given, and submissions made when the two awards were handed down by the Court presided by the Chairman.

Held:

[1] Section 22(4) of the Act obviously refers to a situation which arises when the appointment of a member of the Industrial Court expires during the proceedings of the Court and in those circumstances he shall continue to sit as a member of that Court for the purpose of completing the hearing of and determining any trade dispute or matter commenced before it and until the Court hands down its award under s. 30 of the Act, irrespective of the fact that his appointment as a member of that Court had expired.

[2] However, it would be absurd to say that the fact that there is an application under s. 33A of the Act prevents the final disposal of the trade dispute or reference already determined and in respect of which an award has been made by the Court for the purposes of s. 22(4) in the event, as in this case, when one of its members had ceased to be such after the award has been made.

[3] Section 22(4) of the Act therefore does not apply in this case as the Court which handed down its award on 30 May 1981 had completed its business.

[4] The Appellate Court cannot accept that this is a blatant case of a breach of natural justice. The Industrial Court presided by Harun J, was a differently constituted Court but a Court nevertheless as defined in s. 2 of the Act to hear and determine a new and different matter which was only consequential to and an aftermath of the awards handed down previously.

[Appeal dismissed with costs.]

Cases referred to:

Garland v. Westminster City Council [1970] 21 P & CR 555
Austin Reed Ltd. v. Royal Insurance Co. Ltd. [1956] 1 WLR 1339
Re Rosenfeld and College of Physicians and Surgeons [1970] 11 DLR (3d) 148
R. v. Halifax City Counsel Committee of Works, ex p. Johnston [1962] 34 DLR (2d) 45
R. v. Huntingdon Confirming Authority [1929] 1 KB 698

Legislation referred to:

Industrial Relations Act 1967, ss. 2, (4), 20(3), 22, (4), 23, 30, 33A,(1)(c), (1)(d)
Landlord and Tenant Act 1954 [UK], s. 64
Town and Country Planning Act 1962 [UK], s. 46(3)

For the appellants - V.K. Palasuntharam; (Eugene Lye with him)
For the 1st respondent - D.P. Xavier

JUDGMENT

Raja Azlan Shah CJ (Malaya):

This is an appeal from the decision of Hashim Yeop A. Sani, J dismissing the application of the appellants for an order of *certiorari* to quash the decision of the Industrial Court ('the Court') holding it had jurisdiction to hear and determine two applications under the provisions of s. 33A of the Industrial Relations Act, 1967 ('the Act') to refer to the High Court certain questions of law that had arisen out of two awards made by a different panel of the Court. To appreciate the arguments that have been raised before us it would be necessary to state a few facts.

On 16 August 1979 the Minister of Labour and Manpower referred two trade disputes between the National Union of Hotel, Bar and Restaurant Workers, the 1st respondent to this appeal, and Hotel Malaya Sdn. Bhd., Kuala Lumpur and Kuala Lumpur Restaurant Sdn. Bhd., the appellants, to the Court. On 30 May 1981 the Court composed of Encik K. Somasundaram as

Chairman and three members - Datuk K.K. Nair, Encik Jaffar Mohd Ali and Encik Chiew Peng- handed down two awards. Encik K. Somasundaram has since retired. On September 18 1981 the Court constituted of Harun Mahmud Hashim J, President of the Court and three members - Datuk Chong Shih Guan, Encik Esa bin Haji Ahmad, and Encik R. Retnam - heard applications by the 1st respondent in relation to the two awards to refer certain questions of law arising out of both the awards to the High Court under s. 33A of the Act. Counsel on behalf of the appellants unsuccessfully contended that differently constituted Court had no jurisdiction to hear the applications on the ground that it was not the same Court that handed down the awards on 30 May 1981. He argued that the same Court which handed down the awards on 30 May 1981 should and indeed must hear the applications. It is said that the competence of the Court to hear the applications goes to the very root of its jurisdiction and, where it is lacking, it is a case of inherent lack of jurisdiction.

The Court after hearing argument held on 31 October 1981 in what it termed an interim award that it has jurisdiction to hear the two applications.

Pursuant to the leave granted by Hashim Yeop A. Sani, J in the High Court to apply for an order of *certiorari* to quash the decision of the Court dated 31 October 1981, the learned Judge after hearing arguments with regard to the alleged defect or lack of jurisdiction in the Court which heard the applications under s. 33A of the Act, dismissed the application for *certiorari*. He was not prepared to analyse and dissect the language of s. 33A to read into it the supposed requirement that the Court as constituted which made the two awards in the first instance must hear the applications under s. 33A of the Act. He was of the view that sub-section (4) of s. 22 of the Act is an enabling provision, facilitating a member whose term of office has expired, to continue to sit in uncompleted proceedings, and since the proceedings had been finally disposed of when the Court handed down its awards on 30 May 1981, that provision did not apply.

Before us counsel on behalf of the appellants starts with the submission, and we think that is his main ground, that the proceedings which had begun before the Court presided by Encik K. Somasundaram were not finally disposed of until the expiry of thirty days after the making of the award had expired [s. 33A (3)], or, if an application was made under s. 33A, until that application had been rejected or refused by the Industrial Court, or, if granted, until the determination by the High Court of the questions referred to it [s. 33A(5)]. He relied on the provisions of sub-section (4) of s. 22 of the Act and two cases, *Garland v. Westminster City Council* [1970] 21 P & CR 555 and *Austin Reed Ltd. v. Royal Insurance Co. Ltd.* [1956] 1 WLR 1339.

Section 22 of the Act deals with the constitution of the Court; sub-section (4) of s. 22 of the Act is as follows:

> Any member of the Court constituted under this section whose appointment expires during the proceedings of the Court shall for the purpose of the proceedings continue to be a member of the Court and the term of his appointment shall be deemed to have been extended until the final disposal of the trade dispute or matter.

Garland v. Westminster City Council was concerned with failure to comply with enforcement notices requiring the appellant in that case to demolish certain buildings. The short point about that case is that the enforcement notices would be of no effect if the appellant's appeal had not been "finally determined". The relevant statutory provision, s. 46(3) of the Town and Country Planning Act 1962 enacts: "Where an appeal [to the Minister against an enforcement notice] is brought under this section, the enforcement notice shall be of no

effect pending the **final determination** or withdrawal **of the appeal.**",. (emphasis supplied). It was held "that the time at which an appeal should, under the section, be considered as having been finally determined must be, at the latest, the time when an appeal to the Minister or from the Minister to the Divisional Court or from the Divisional Court to the Court of Appeal had been dismissed and the time for appealing further had expired without any such further appeal having been instituted." It is significant to note that the case was decided upon the construction of s. 46(3) of that particular statute.

Austin Reed Ltd. v. Royal Insurance Co. Ltd. was a case concerning the date on which an application for the grant of a new tenancy was "finally disposed of" within the meaning of s. 64 of the Landlord and Tenant Act, 1954. The facts do not concern us but the section, *inter alia*, provides that "the date on which an application is finally disposed of shall be constructed as a reference to the earliest date by which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired..." It was held that the application was "finally disposed of" when the application was refused by the Judge, and the appeal from his decision was dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused by the Court of Appeal and when the time within which a petition could be lodged with the House of Lords for leave to appeal had expired.

It is unnecessary and not within our province to cavil at the decisions of those two cases. Suffice it to say that they rested on the particular construction of the two provisions of the English statutes in question. Hashim Yeop A. Sani J has rightly expressed his view that they have no application to the facts of the present case. In our opinion, the reliance placed on those two authorities is misplaced. They have no bearing on the question that arises for decision here.

With all respect to the energy and persistence which Counsel on behalf of the appellants has brought to his task, in our judgment, one only has to look at his submission superficially to see that it cannot be sustained. It is axiomatic that the Act is a self-contained legislative enactment which, *inter alia*, established the Court with power to resolve trade disputes referred to it and deal with references to it under sub-section (3) of s. 20 of the Act. The Industrial Court is constituted pursuant to the provisions of Part VII of the Act and includes, unless a contrary intention appears, any Court under s. 22 constituted for the purpose of dealing with any trade dispute or matter referred to it, and any division thereof (section 2). In practice there are five divisions of the Court, *viz.* the Court consisting of the President and three members; and four other divisions, each presided by a Chairman and three members (s. 23). Encik K. Somasundram was one of its Chairmen. It exercises a quasi-judicial function. It gives a full reasoned judgment in the nature of an award (s. 30). Its functions comprise an investigation of the facts, an analysis of the facts, findings of fact, and, lastly, the application of the law to those findings.

In our opinion, sub-section (4) of s. 2 of the Act obviously refers to a situation which arises when the appointment of a member of the Court expires during the proceedings of the Court and in those circumstances he shall continue to sit as a member of that Court for the purpose of completing the hearing of and determining any trade dispute or matter commenced before it. In simple language, that member continues to sit until the Court hands down its award under s. 30 of the Act, irrespective of the fact that his appointment as a member of that Court has expired. It would be absurd to say that the fact that there is an application under s. 33A of the Act prevents the final disposal of the trade dispute or reference already

determined and in respect of which an award has been made by the Court for the purpose of s. 22(4) in the event, as in this case, when one of its members has ceased to be such after the award has been made.

In the circumstances, we are of the view that sub-section (4) of s. 22 of the Act does not apply in the present case. The Court which handed down its award on 30 May 1981 had completed its business.

Another ground which counsel on behalf of the appellants takes is of even less substance than the first. It relates to the construction of s. 33A of the Act. In a nutshell it is said that the section envisages that the same members who constituted the Court which handed down the awards on May 30, 1981, must hear the application under s. 33A because they were familiar with the proceedings having taken part in them in the earlier stages and that a differently constituted Court would not possess first-hand knowledge of the sub-stantive proceedings. That, it is submitted, can be gathered from the language used in paragraphs (c) and (d) of sub-section (1) of s. 33A of the Act which read:

> (1) Where the Court has made an award under s. 30 (1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law:
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> (a) which, in the opinion of the Court, is of sufficient importance to merit such reference; and
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> (b) the determination of which by the Court raises, in the opinion of the Court, sufficient doubts to merit such reference.

We are not impressed by the argument of counsel. Having regard to the language of the section which admittedly contemplates that the Court mentioned therein is the Court as defined in s. 2 of the Act, it would, in our opinion, be a perfectly legitimate view to take that if the legislature therein, it would have done in sub-section (5) of s. 33, instead of leaving it as a matter of mere inference from its provisions. Section 33 deals with the interpretation of an award or collective agreement with the object of removing ambiguity or uncertainty and sub-section (5) is as follows:

> The expression 'Court' for the purpose of this section, means the **Court by which the award was made** or any other Court specially constituted under s. 22 for the purpose. [emphasis supplied].

In our opinion, the legislature could very well have said in s. 33A, if it had indeed intended to, "Where the Court by which the award was made, may, in its discretion, refer to the High Court...", instead of using in its present form "Where the Court has made an award..."

A further point taken by the counsel on behalf of the appellants is the effect of the principles of natural justice. Shortly stated, it is a breach of natural justice for the freshly constituted Court to participate in the decision of 31 October 1981, if it has not heard all the evidence given, and submissions made when the two awards were handed down at the earlier proceedings before the Court presided by Encik K. Somasundram. The authorities cited to us, *viz, Re Rosenfeld and College of Physicians and Surgeons* [1970] 11 DLR (3d) 148; *R. v. Halifax City Counsel Committee of Works, ex p. Johnston* [1962] 34 DLR (2d) 45, 57 and *R. v. Huntingdon Confirming Authority* [1929] 1 KB 698 deal with an entirely different situation and it is therefore neither necessary nor pertinent to discuss these cases. We do not accede to the view expressed by counsel that this is a blatant case of breach of natural justice. In our opinion, this is a case in which the Court presided by Harun J, heard an application to

refer to the High Court certain questions of law arising out of the two awards; it did not hear any evidence or hand down any award. It was a differently constituted Court but a Court nevertheless as defined in s. 2 of the Act to hear and determine a new and different matter which was only consequential to and an aftermath of the awards handed down previously.

We accordingly dismiss the appeal with costs.

Also found at [1982] CLJ 460